

The ruling you have requested has been amended as a result of litigation and has been attached to this document.



OFFICE of the ATTORNEY GENERAL
GREG ABBOTT

May 1, 2003

Ms. Sara Shiplet Waitt
Legal and Compliance Division
Texas Department of Insurance
P.O. Box 149104
Austin, Texas 78714-9104

OR2003-2940

Dear Ms. Waitt:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 180286.

The Texas Department of Insurance (the "department") received a request for copies of rate information provided by "the 10 largest insurance companies in terms of HO market share . . . in an effort to justify their rates to the state."¹ You state that you have withheld some of the responsive information pursuant to a previous determination issued by this office in Open Records Letter No. 99-1264 (1999).² See Open Records Decision No. 673 (2001) (previous determinations generally). You claim that some of the submitted information is excepted from disclosure under section 552.137 of the Government Code. In addition, you indicate that the release of the remaining submitted information may implicate third parties' proprietary rights. Although you raise no exception to disclosure of this information on behalf of the department, you have notified the interested third parties—Allstate Insurance Company ("Allstate"), Hartford Lloyd's Insurance Company ("Hartford"), Nationwide Lloyds ("Nationwide"), State Farm Lloyds ("State Farm"), Chubb Lloyds Insurance Company of Texas ("Chubb"), Texas Farm Bureau Underwriters ("Farm Bureau"), USAA, Safeco Lloyds Insurance Company ("Safeco"), Traveler's Lloyds of Texas ("Traveler's"),

¹You inform this office that in an effort to fully comply with the information request, the department has interpreted the request to encompass more than ten insurance companies.

²You indicate that the department is withholding responsive information pertaining to Farmers Insurance Exchange, Fire Insurance Exchange, Allstate Insurance Company, and State Farm Insurance Company under the previous determination.

and Liberty Lloyds Insurance Company ("Liberty")—pursuant to section 552.305 of the Government Code. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure in certain circumstances). Hartford, Nationwide, State Farm, Chubb, Farm Bureau, USAA, Safeco, and Liberty claim that their information is excepted from disclosure under sections 552.101, 552.110, and 552.112 of the Government Code. We have considered all claimed exceptions and reviewed the submitted information.

Chubb claims that its information, sent to the department in response to the department's subpoena, is confidential under section 552.101 pursuant to sections 36.158(a) and 36.159(a) of the Insurance Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. In this regard, we note that section 36.158(a) provides that

A record or other evidence acquired under a subpoena under this subchapter is not a public record for the period the commissioner considers reasonably necessary to

- (1) complete the investigation
- (2) protect the person being investigated from unwarranted injury; or
- (3) serve the public interest.

Ins. Code § 36.158(a). Section 36.159(a) provides, in relevant part, that "A record subpoenaed and produced under this subchapter *that is otherwise privileged or confidential by law* remains privileged or confidential until admitted into evidence in an administrative hearing or a court." (Emphasis added.) Ins. Code § 36.159(a).

The Commissioner of Insurance has not informed this office that he wishes to withhold any of the submitted information under section 36.158(a). Accordingly, we find that section 36.158(a) of the Insurance Code is inapplicable to the information at issue, and you may not withhold it on this basis. We also find that section 36.159(a) does not make information confidential; rather, this section maintains the confidentiality of information when that information is subpoenaed and produced under chapter 36 of the Insurance Code. Thus, unless Chubb's information is confidential under another source of law, it may not be withheld under section 36.159(a).

Nationwide indicates that its information is excepted from disclosure based on its expectation of confidentiality in the information submitted to the department. Information

is not confidential under the Public Information Act (the "Act") simply because the party submitting the information anticipates or requests that it be kept confidential. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). In other words, a governmental body cannot, through an agreement or contract, overrule or repeal provisions of the Act. Attorney General Opinion JM-672 (1987); Open Records Decision No. 541 at 3 (1990) ("[T]he obligations of a governmental body under [the predecessor to the Act] cannot be compromised simply by its decision to enter into a contract."). Consequently, unless Nationwide's information falls within an exception to disclosure, it must be released, notwithstanding any agreement or expectation indicating otherwise.

USAA contends that its information is excepted under section 552.101 in conjunction with Senate Bill 310. Senate Bill 310, which was enacted February 25, 2003 and was effective as of that date, relates to information required to be filed by certain insurers of residential property. Specifically, Senate Bill 310 provides that "[i]nformation filed by an insurer with the department under this article that is confidential under a law that applied to the insurer before the effective date of this article remains confidential and is not subject to disclosure." *See* Act of February 25, 2003, 78th Leg., R.S., S.B. 310, ch. 1 (to be codified at Ins. Code art. 5.141 § 5a). Thus, Senate Bill 310 does not make information confidential; rather, this section maintains the confidentiality of information when that information is filed by an insurer with the department under Senate Bill 310 and the information is confidential under a law that applied to the insurer before the effective date of Senate Bill 310. Furthermore, USAA does not indicate, nor does it otherwise appear, that the information at issue was submitted pursuant to Senate Bill 310. Rather, we note that the information was sent to the department before the enactment of Senate Bill 310. Thus, USAA's information may not be withheld under Senate Bill 310.

We note that Hartford contends that its information is excepted from disclosure under section 552.112 of the Government Code. Section 552.112 excepts from public disclosure "information contained in or relating to examination, operation, or condition reports prepared by or for an agency responsible for the regulation or supervision of financial institutions or securities, or both." Section 552.112 is designed to protect the interests of a governmental body, not third parties. *See Birnbaum v. Alliance of Am. Insurers*, 994 S.W.2d 766, 776 (Tex. App.—Austin 1999, *pet. denied*). Because the department does not raise section 552.112, this section also is not applicable to the requested information. *Id.*

We turn now to the third parties' arguments that the requested information is excepted from disclosure under section 552.110 of the Government Code. Section 552.110 protects the property interests of private persons by excepting from disclosure two types of information: (1) trade secrets obtained from a person and privileged or confidential by statute or judicial decision and (2) commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained. Each individual business entity claiming

section 552.110(a) or (b) bears its own burden of proving that its information falls under one of these prongs. *See* Gov't Code § 552.110; Open Records Decision No. 661 at 5 (1999). With respect to the trade secret prong of section 552.110, we note that the Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex.), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 at 2 (1990). Section 757 provides that a trade secret is:

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939). In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors. RESTATEMENT OF TORTS § 757 cmt. b (1939).³ This office has held that when, as here, a governmental body takes no position with regard to the application of the trade secret branch of section 552.110 to requested information, we must accept a business entity's claim for exception as valid under that branch if that entity establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 at 5-6 (1990).

³The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are:

- (1) the extent to which the information is known outside of [the company];
- (2) the extent to which it is known by employees and others involved in [the company's] business;
- (3) the extent of measures taken by [the company] to guard the secrecy of the information;
- (4) the value of the information to [the company] and [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing the information;
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

A business entity raising the commercial and financial information prong of section 552.110 is required to provide this office a specific factual or evidentiary showing, not conclusory or generalized allegations, that it would suffer substantial competitive injury from disclosure of its information. Gov't Code § 552.110(b); *see* Open Records Decision No. 661 (1999).

Based on our review of the third parties' arguments and the submitted information, we find that Hartford, Nationwide, Chubb, Farm Bureau, and USAA have established a *prima facie* case that most of their information is excepted from disclosure under section 552.110(a) of the Government Code. We have received no arguments that rebut these third parties' claims as a matter of law. Therefore, the department must withhold the information that we have marked pertaining to Hartford, Nationwide, Chubb, Farm Bureau, and USAA pursuant to section 552.110(a). We also find that Liberty has demonstrated that portions of its submitted information constitute commercial or financial information, the release of which would cause Liberty substantial competitive harm. We have marked this information, which must be withheld under section 552.110(b). However, we find that Hartford, Nationwide, State Farm, Chubb, Farm Bureau, USAA, Safeco, and Liberty have not adequately demonstrated that the remaining submitted information consists of either trade secret information or commercial or financial information the release of which would result in substantial competitive harm to these third parties. Therefore, we determine that Hartford, Nationwide, State Farm, Chubb, Farm Bureau, USAA, Safeco, and Liberty have not shown that the remainder of the submitted information is excepted under section 552.110.

Next, we note that neither Allstate nor Traveler's has submitted briefing to this office. An interested third party is allowed 10 business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have not received from Allstate or Traveler's any arguments for withholding their requested information. We thus have no basis for concluding that this information is excepted from disclosure as protected proprietary information. *See id.* § 552.110(b); Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm); 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990). Therefore, the department may not withhold from disclosure information pertaining to Allstate or Traveler's in order to protect these third parties' proprietary interests.

We note, and you assert, that portions of the submitted information not otherwise excepted under section 552.110 are excepted from disclosure under section 552.137 of the Government Code. Section 552.137 provides that "[a]n e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Public Information Act]." Therefore, unless the relevant individuals have affirmatively consented to the release of their

e-mail addresses, the department must withhold the e-mail addresses in the remaining submitted information which you have marked in red under section 552.137.⁴ We have also marked additional information the department must withhold under this exception.

In summary, the department must withhold the information we have marked under sections 552.110(a) and 552.110(b). Marked e-mail addresses are excepted from disclosure under section 552.137. The remaining requested information must be released to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

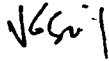
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

⁴We note that section 552.137 does not apply to a government employee's work e-mail address, the general e-mail address of a business, nor to a web site or web page.

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



V.G. Schimmel
Assistant Attorney General
Open Records Division

VGS/sdk

Ref: ID# 180286

Enc: Submitted documents

c: Mr. Bennett E. Cunningham
CBS 11 TV-Dallas
5233 Briggs Street
Fort Worth Texas 76103
(w/o enclosures)

CAUSE NO. GN301542

STATE FARM LLOYDS,
Plaintiff,

V.

GREG ABBOTT, ATTORNEY GENERAL
OF TEXAS, and THE TEXAS
DEPARTMENT OF INSURANCE,
Defendants.

§ IN THE DISTRICT COURT OF
§
§
§
§ TRAVIS COUNTY, TEXAS
§
§
§
§ 353RD JUDICIAL DISTRICT

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Marianne H. H. H. H.
DISTRICT CLERK
TRAVIS COUNTY, TEXAS

AGREED FINAL JUDGMENT

On this date, the Court heard the parties' motion for entry of an agreed final judgment. Plaintiff State Farm Lloyds (State Farm), and Defendants, Greg Abbott, Attorney General of Texas, and the Texas Department of Insurance (TDI) appeared, by and through their respective attorneys, and announced to the Court that all matters of fact and things in controversy between them had been fully and finally compromised and settled. This cause is an action under the Public Information Act (PIA), Tex. Gov't Code ch. 552. The parties represent to the Court that, in compliance with Tex. Gov't Code § 552.325(c), the requestor, Bennett E. Cunningham, was sent reasonable notice of this setting and of the parties' agreement that the TDI must withhold the information at issue; that the requestor was also informed of his right to intervene in the suit to contest the withholding of this information; and that the requestor has not informed the parties of his intention to intervene. Neither has the requestor filed a motion to intervene or appeared today. After considering the agreement of the parties and the law, the Court is of the opinion that entry of an agreed final judgment is appropriate, disposing of all claims between these parties.


IT IS THEREFORE ADJUDGED, ORDERED AND DECLARED that:

1. The information at issue, Exhibit 10 to State Farm Lloyds' rate filing submitted to TDI by State Farm, is a trade secret and commercial or financial information and, therefore, is

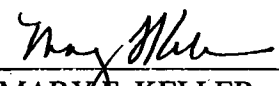
excepted from disclosure by Tex. Gov't Code § 552.110;


2. The TDI shall withhold Exhibit 10 from the requestor;
3. If it has not already done so, the TDI shall release to the requestor any other information pertaining to State Farm that is responsive to the request for information;
4. All costs of court are taxed against the parties incurring the same;
5. All relief not expressly granted is denied; and
6. This Agreed Final Judgment finally disposes of all claims between Plaintiff and Defendants and is a final judgment.

SIGNED this the 24 day of August, 2004.


PRESIDING JUDGE

APPROVED:


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